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Nos. 99-804 and 99-939

In the Supreme Court of the United States

CARL W. CLEVELAND, PETITIONER

v.

UNITED STATES OF AMERICA

FRED H. GOODSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether video poker licenses issued by the State of Louisiana constitute "property" within the meaning of the mail fraud statute, 18 U.S.C. 1341.

2. Whether the district court committed plain error in failing to instruct the jury on the materiality element of a mail fraud offense.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a[1]) is reported at 182 F.3d 296. The opinion of the district court (Pet. App. 52a-86a) is reported at 951 F. Supp. 1249.

[1] References to "Pet." and "Pet. App." are to No. 99-804 unless otherwise specified.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1999. The petition for rehearing was denied on September 2, 1999. The petition for a writ of certiorari in No. 99-804 was filed on November 9, 1999. The petition for a writ of certiorari in No. 99-939 was filed on December 1, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners Cleveland and Goodson were convicted of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c); conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); and two counts of mail fraud, in violation of 18 U.S.C. 1341. In addition, petitioner Cleveland was convicted of four counts of money laundering, in violation of 18 U.S.C. 1956; tax conspiracy, in violation of 18 U.S.C. 371; and filing a false tax return, in violation of 26 U.S.C. 7206(2). Petitioner Goodson was convicted of five counts of money laundering and three counts of the use of interstate communications in aid of state bribery, in violation of 18 U.S.C. 1952. Each petitioner was sentenced to 121 months' imprisonment. In addition, the district court ordered the forfeiture of their interests in two business entities. The court of appeals affirmed. Pet. App. 1a-44a.

1. The evidence at trial showed that, in early 1992, petitioner Fred Goodson and his family formed TSG, Ltd., and its corporate partner, TSG, Inc., in order to participate in the video poker business at their truck

stop in Slidell, Louisiana. With the assistance of petitioner Carl Cleveland and petitioner Goodson's law firm, Cleveland, Barrios, Kingsdorf & Casteix, the Goodsons prepared and submitted to the Louisiana State Police applications for a gaming license for TSG, Ltd. The applications required partnerships seeking gaming licenses to identify their partners; to submit personal financial statements for all partners; to affirm that the listed partners were the sole beneficial owners; and to affirm that no partner had an arrangement to hold his interest as "an agent, nominee or otherwise," or a present intention to transfer any interest in the partnership at a future time. Pet. App. 2a-3a.

The initial application submitted on behalf of TSG, Ltd., identified Maria and Alex Goodson, Fred Goodson's adult children, as the limited partners and TSG, Inc., as the general partner. The application listed no other persons or entities as having any ownership interest in TSG, Ltd. TSG, Ltd. submitted renewal applications in 1993, 1994, and 1995 that also listed no additional ownership interests. In fact, at all times the true owners of the company were petitioners Goodson and Cleveland. The two concealed their ownership interest from state regulators in order to avoid the probing inquiry of the State's suitability assessment. Pet. App. 5a-6a.

2. The mail fraud statute, 18 U.S.C. 1341, makes it a crime to use the mail in connection with "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." The mail fraud counts of the indictment charged that the defendants had devised a scheme to deprive the State of Louisiana and its citizens of "property" by "fraudulently obtaining and renewing, through the submission of false and in-

complete information, state licenses to operate video poker sites." Pet. App. 74a.

Before trial, petitioner Cleveland adopted a motion filed by his co-defendant, petitioner Goodson, to dismiss the mail fraud counts on the ground that state licenses to operate video poker sites do not constitute "property" within the meaning of Section 1341. Petitioners argued, among other things, that such licenses do not become property until they are issued, because they have no value to the State. Accordingly, in petitioners' view, an attempt to acquire a state license through false representations does not implicate any state property interest. The district court rejected that contention. Pet. App. 73a-86a.

3. On appeal, petitioners renewed their contention that state licenses do not constitute property for purposes of the mail fraud statute. Relying on *United States* v. *Salvatore*, 110 F.3d 1131 (5th Cir.), cert. denied, 522 U.S. 981 (1997), the court of appeals affirmed the ruling of the district court. See Pet. App. 19a. In *Salvatore*, the court, applying *McNally* v. *United States*, 483 U.S. 350 (1987), and *Carpenter* v. *United States*, 484 U.S. 19 (1987), reasoned that "in considering whether video poker licenses constitute property under the mail fraud statute, we must determine whether Louisiana has an interest in the licenses as a property holder." 110 F.3d at 1139. The court held that Louisiana had more than just a regulatory interest in the video poker licenses, thereby justifying application of the mail fraud statute. *Ibid.*

The *Salvatore* court first reasoned that the concept of property involves a legal "bundle of rights," including the rights to "possess, use, and dispose" of a particular article. 110 F.3d at 1140. As applied to licenses, the court found that that "bundle" includes the right to

control their issuance. The court also concluded that Louisiana had "zealously sought to protect its right to control the [video poker] licenses" at issue here. *Ibid.* The court went on to reject a distinction between issued and unissued licenses, finding that unissued video poker licenses had value to the State. *Id.* at 1141. The court further determined that the State has a property, and not merely a regulatory, interest in the video poker licenses, because the State had "a direct and significant [continuing] financial stake * * * as issuer of the licenses" in the video poker industry. *Id.* at 1142.

The court of appeals concluded that the Louisiana statutory scheme, by expressly stating a limitation on the property interests of licensees, evinces an intent that the State is to maintain its control and ownership of video poker licenses. 110 F.3d at 1142 (discussing La. Rev. Stat. Ann § 27:301(D) (West Supp. 1997)). Similarly, after applying traditional property law concepts, the court found that the licenses constituted property. *Id.* at 1142-1143.

4. Following oral argument on petitioners' appeal, petitioners sought leave to file a supplemental brief in light of this Court's intervening decision in *Neder* v. *United States*, 119 S. Ct. 1827 (1999), which held that the materiality of the falsehoods used in a scheme to defraud is an element of a mail fraud offense, *id.* at 1841. Petitioners argued that the district court committed plain error in failing to give a materiality instruction. The government opposed petitioners' motion, arguing that supplemental briefing was unnecessary because the issue had been waived, the district court had in any event included materiality language in the jury charge, and the defendants in fact had argued materiality to the jury. The court of appeals denied the

motion and did not address the issue in its opinion issued eight days later.

ARGUMENT

1. Petitioner Cleveland contends (Pet. 9-21) that the video poker licenses do not constitute "property" within the meaning of the mail fraud statute, 18 U.S.C. 1341. Petitioner Goodson (99-939 Pet. 11) adopts petitioner Cleveland's argument.[2] The courts below correctly rejected that contention, and it does not warrant further review.

a. In *Carpenter* v. *United States*, 484 U.S. 19 (1987), the court affirmed the wire fraud conviction of a *Wall Street Journal* columnist who had traded stock before publication of his newspaper column based on his knowledge of what the column would say. The Court made clear that the intangible nature of the misappropriated confidential information did not make the information any less a form of "property" within the mail fraud statute. *Id.* at 25-27. The Court explained

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[2] The court of appeals stated that "Maria Goodson and Attorney Cleveland assert that a Louisiana video poker license is not 'property' for purposes of the mail fraud statute." Pet. App. 19a. Petitioner Fred Goodson unsuccessfully requested that the court of appeals modify its decision to reflect that he too had raised the property/license issue on appeal from the district court judgment. The government opposed that motion on the ground that petitioner Goodson had not properly developed that argument under Federal Rule of Appellate Procedure 28(i) and had improperly attempted to adopt petitioner Cleveland's argument. The court of appeals denied petitioner Goodson's motion and did not modify its decision. Thus, in the court below, petitioner Goodson waived his opportunity to contend that the district court had erred in rejecting petitioner Cleveland's argument that Louisiana video poker licenses are not "property" within the ambit of the mail fraud offense.

that the *Journal* had been deprived of its property right to make exclusive use of its confidential information, even though the defendants had not totally deprived the *Journal* of its possession of the information or its ability to publish it. *Id.* at 26-27.

Here, the State of Louisiana had a property interest in the unissued video poker licenses similar to the *Wall Street Journal*'s interest in maintaining the confidentiality of its business information. In *Carpenter*, the Court held that the *Journal*'s exclusive right to control its confidential information was a property interest. 484 U.S. at 26. By the same token, in this case, "what the [State] (and derivatively its people) lost was the right to keep its [video poker] licenses to itself and to bestow them on persons who had fairly earned them." *United States* v. *Martinez*, 905 F.2d 709, 714 (3d Cir.), cert. denied, 498 U.S. 1017 (1990). The State also lost the right to control who handled a substantial, continuing source of earnings under the licenses. The court of appeals thus correctly found that the licenses had continuing value to the State.

b. Petitioner Cleveland contends (Pet. 10-13) that the instant decision conflicts with holdings of other courts of appeals that particular licenses, especially unissued licenses, did not constitute property under the mail fraud statute. Although the Fifth Circuit in *Salvatore* criticized reasoning in some of those cases that an unissued license cannot be property even though an issued license can be, 110 F.3d at 1140-1141, it ultimately explained that "video poker licenses are different than other types of licenses," *id.* at 1142 n.2, because of the "character of the licenses themselves," *id.* at 1141. Because of the distinct characteristics of Louisiana's video poker license, the holding here is distinguishable from decisions of other courts of appeals

that have reversed mail fraud convictions on the ground that various types of licenses were not property. See, *e.g.*, *United States* v. *Schwartz*, 924 F.2d 410, 417-418 (2d Cir. 1991) (arms export license); *United States* v. *Granberry*, 908 F.2d 278, 280 (8th Cir. 1990) (school bus operator's permit), cert. denied, 500 U.S. 921 (1991); *United States* v. *Kato*, 878 F.2d 267, 268-269 (9th Cir. 1989) (private pilot's license); *Toulabi* v. *United States*, 875 F.2d 122, 125 (7th Cir. 1989) (taxi driver's license); *United States* v. *Dadanian*, 856 F.2d 1391, 1392 (9th Cir. 1988) (gambling license); *United States* v. *Murphy*, 836 F.2d 248, 254 (6th Cir.) (bingo license), cert. denied, 488 U.S. 924 (1988).

As the *Salvatore* court explained, those cases rest on the theory that, in the manner in which particular licenses operated in the States that had issued them, the licenses did not represent property to the issuing governments. Rather, under the reasoning of those cases, "the issuance of a license is nothing more than a physical manifestation of the government's intent to regulate." 110 F.3d at 1141. The *Salvatore* court "agree[d], as an initial matter, that the right to regulate a particular industry does not *a fortiori* give the regulator a property interest in licenses signifying the government's regulation." *Ibid.* With respect to video poker licenses, however, the State "has a direct and significant financial stake in its role as issuer of the licenses" because it receives an "up-front fee" for the license and a significant percentage of net revenues as a franchise fee. *Id.* at 1142. The *Salvatore* court noted that Louisiana fully expected to receive continuing funds from the video poker license (22.5% of the licensee's net revenues), such that the license "evinces the State's intent to participate in the industry." *Ibid.* The entitlement to control the sources of future re-

venue gave the State a continuing property interest in the license.

The cases on which petitioner Cleveland (Pet. 11-13) relies involve licenses that lack that revenue-producing feature. See *United States* v. *Shotts*, 145 F.3d 1289, 1294-1295 (11th Cir. 1998) (no indication of continuing government financial stake in bail bond license), cert. denied, 119 S. Ct. 1111 (1999); *United States* v. *Paccione*, 949 F.2d 1183, 1186-1187 (2d Cir. 1991) (same for medical waste dumping permit), cert. denied, 505 U.S. 1220 (1992); *Granberry*, 908 F.2d at 280 (same for bus license); *Kato*, 879 F.2d at 269 (same for pilot's license); *Toulabi*, 875 F.2d at 126 (same for taxi driver license); *Dadanian*, 856 F.2d at 1392 (same for poker club license); *Murphy*, 836 F.2d at 250-254 (same for bingo license). Accordingly, none of those cases conflicts with the holding that Louisiana video poker licenses represent a government property right protected by the mail fraud statute.[3]

2. Relying on *Neder* v. *United States*, 119 S. Ct. 1827 (1999), petitioners contend (Pet. 21-25; 99-939 Pet. 10-11) that the district court committed plain error in failing to instruct the jury that a falsehood charged in a mail fraud offense must be found to be material.[4] The court of appeals correctly declined to address that

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[3] We note that the petition for a writ of certiorari in *Salvatore*, which this Court denied, 522 U.S. 981 (1997), raised precisely the same claim that petitioners raise here. The only decision cited by petitioners that was decided since this Court denied certiorari in *Salvatore* is *United States* v. *Shotts*, 145 F.3d 1289 (11th Cir. 1998), cert. denied, 119 S. Ct. 1111 (1999), and that case is readily distinguishable for the reasons given in the text.

[4] Petitioners invoke the plain error standard of review in light of their failure to request a materiality instruction at trial. See Pet. 25 n.20; 99-939 Pet. 10 n.5.

claim, since petitioners sought to raise it for the first time in a supplemental brief filed eight days before the court issued its decision. It is well settled that a defendant waives appellate consideration of an issue raised for the first time in a reply or later supplemental brief. See, *e.g.*, *Dunham* v. *Kisak*, 192 F.3d 1104, 1110 (7th Cir. 1999); *United States* v. *Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 759 (6th Cir. 1999); *Orsini* v. *Wallace*, 913 F.2d 474, 476 n.2 (8th Cir. 1990), cert. denied, 498 U.S. 1128 (1991). Petitioners are not relieved from their waiver because *Neder* was decided after oral argument in the court of appeals. At the time the petitioners filed their initial brief on appeal, there was a clear-cut conflict in the circuits on whether the materiality of a charged falsehood is an element of mail or wire fraud. Compare, *e.g.*, *United States* v. *Slaughter*, 128 F.3d 623, 629 (8th Cir. 1997); *United States* v. *Cochran*, 109 F.3d 660, 667 n.3 (10th Cir. 1997) (materiality not an element), with *United States* v. *Rodriguez*, 140 F.3d 163, 167 (2d Cir. 1998); *United States* v. *DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998) (materiality is an element). Indeed, contrary to petitioner Cleveland's contention (Pet. 21), the issue was an open one in the Fifth Circuit. See *United States* v. *Moser*, 123 F.3d 813, 825-827 (5th Cir.), cert. denied, 522 U.S. 1035 (1997). In light of that waiver, petitioners have not properly preserved that issue for consideration by this Court.[5]

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[5] Petitioner Cleveland cites (Pet. 22) several cases in which this Court has granted the petition for certiorari, vacated the decision below, and remanded for further consideration in light of intervening authority. In each of those cases, however, the intervening authority had a crucial bearing on an issue timely raised on direct appeal and addressed by the appellate court.

In any event, petitioners' claim is without merit because the district court did give an adequate materiality instruction in connection with the mail fraud counts. The theory of the government's case was that, in documents filed with the State, petitioners concealed their ownership interests in TSG, Ltd., and other information to avoid the State's suitability assessment. The court instructed the jury that, in order to constitute a scheme to defraud, an omission must be "reasonably calculated to deceive persons of ordinary prudence and comprehension" and that it must "conceal[] a *material* fact." R. App. 4407 (emphasis added). The jury was thus instructed that it could find petitioners guilty of mail fraud based only on concealment of material information.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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